

Apr 02, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HAROLD MAZZEI,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No.4:17-CV-05056-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF Nos. 14, 15. Attorney D. James Tree represents Harold Mazzei (Plaintiff); Special Assistant United States Attorney Joseph John Langkamer represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **REMANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

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The facts of the case are set forth in the administrative hearing transcript, the ALJ's decision, and the briefs of the parties. They are only briefly summarized here.

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo, deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is

1 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
2 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
3 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
4 another way, substantial evidence is such relevant evidence as a reasonable mind
5 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
6 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
7 interpretation, the court may not substitute its judgment for that of the ALJ.
8 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
9 findings, or if conflicting evidence supports a finding of either disability or non-
10 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
11 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
12 evidence will be set aside if the proper legal standards were not applied in
13 weighing the evidence and making the decision. *Browner v. Secretary of Health*
14 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

15 SEQUENTIAL EVALUATION PROCESS

16 The Commissioner has established a five-step sequential evaluation process
17 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*
18 *v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through four, the burden of
19 proof rests upon the claimant to establish a prima facie case of entitlement to
20 disability benefits. *Tackett*, 180 F.3d at 1098-99. This burden is met once the
21 claimant establishes that physical or mental impairments prevent him from
22 engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant
23 cannot do his past relevant work, the ALJ proceeds to step five, and the burden
24 shifts to the Commissioner to show that (1) the claimant can make an adjustment to
25 other work, and (2) specific jobs which the claimant can perform exist in the
26 national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94
27 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the
28 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

1 **ADMINISTRATIVE DECISION**

2 On December 29, 2015, the ALJ issued a decision finding Plaintiff was not
3 disabled as defined in the Social Security Act.

4 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
5 activity since January 2, 2014, the date of application. Tr. 25.

6 At step two, the ALJ determined Plaintiff had the following severe
7 impairments: lumbar and cervical spine degenerative disc disease and obesity. Tr.
8 25.

9 At step three, the ALJ found Plaintiff did not have an impairment or
10 combination of impairments that met or medically equaled the severity of one of
11 the listed impairments. Tr.29.

12 At step four, the ALJ assessed Plaintiff's residual function capacity and
13 determined he could perform a range of light work with the following limitations:

14
15 The claimant can frequently reach below shoulder level and
16 occasionally reach overhead (i.e. above shoulder level). He can
17 frequently handle. The claimant can occasionally balance, stoop, kneel,
18 and crouch. He cannot climb ladders, ropes, scaffolds, ramps or stairs
19 and cannot crawl. The claimant must avoid concentrated exposure to
20 vibrations and hazards. The claimant can perform simple, routine tasks
21 and follow short, simple instructions. The claimant can do work that
22 needs little or no judgment and can perform simple duties that can be
23 learned on the job in a short period. The claimant requires a work
24 environment with minimal supervisor contact (minimal contact does
25 not preclude all contact, rather it means contact does not occur
26 regularly. Minimal contact also does not preclude simple and
27 superficial exchanges and it does not preclude being in proximity to the
28 supervisor). The claimant can work in proximity to coworkers but not
in a cooperative or team effort. The claimant requires a work
environment that has no more than superficial interactions with co-
workers. He requires a work environment without public contact.

Tr. 29. The ALJ identified Plaintiff's past relevant work as production assembler
and forklift operator and concluded that Plaintiff was able to perform his past

1 relevant work as a production assembler. Tr. 33.

2 In the alternative to a step four denial, the ALJ also made a step five
3 determination that, considering Plaintiff's age, education, work experience and
4 residual functional capacity, and based on the testimony of the vocational expert,
5 there were other jobs that exist in significant numbers in the national economy
6 Plaintiff could perform, including the jobs of hand packager and mail clerk. Tr.
7 33-34. The ALJ concluded Plaintiff was not under a disability within the meaning
8 of the Social Security Act at any time from January 2, 2014, through the date of the
9 ALJ's decision. Tr. 35.

10 ISSUES

11 The question presented is whether substantial evidence supports the ALJ's
12 decision denying benefits and, if so, whether that decision is based on proper legal
13 standards. Plaintiff contends the ALJ erred by (1) failing to properly address
14 Plaintiff's symptom statements, (2) failing to make a proper step two
15 determination, (3) failing to make a proper step three determination, and (4) failing
16 to properly weigh the medical opinions in the record.

17 DISCUSSION

18 1. Plaintiff's Symptom Statements

19 Plaintiff contests the ALJ's determination that his statements concerning the
20 intensity, persistence, and limiting effects of his symptoms were less than fully
21 credible. ECF No. 14 at 12-19.

22 It is generally the province of the ALJ to make credibility determinations,
23 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
24 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
25 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
26 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
27 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
28 "General findings are insufficient: rather the ALJ must identify what testimony is

1 not credible and what evidence undermines the claimant's complaints." *Lester*, 81
2 F.3d at 834.

3 The ALJ found Plaintiff's statements less than fully credible concerning the
4 intensity, persistence, and limiting effects of his symptoms. Tr. 30. The ALJ
5 reasoned that Plaintiff's statements were less than fully credible for three reasons:
6 (1) they were inconsistent with the medical evidence; (2) they were inconsistent
7 with his reported activities; and (3) he made inconsistent statements regarding
8 these symptoms and their limiting effects.

9 **A. Contrary to the objective medical evidence**

10 The ALJ's first reason for finding Plaintiff's statements less than fully
11 credible, that Plaintiff's symptoms are not supported by objective medical
12 evidence, fails to meet the specific, clear, and convincing standard. While
13 objective medical evidence is a "relevant factor in determining the severity of the
14 claimant's pain and its disabling effects," it cannot be the sole reason for rejecting
15 the testimony. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). Here the
16 ALJ's two additional reasons for rejecting Plaintiff's testimony fails to meet the
17 specific, clear, and convincing standard. *See infra*. Therefore, this reason alone
18 cannot support the ALJ's determination.

19 **B. Reported Activities**

20 The ALJ's second reason for finding Plaintiff's statements less than fully
21 credible, that Plaintiff's activities cast doubt on his alleged limitations, does not
22 meet the specific, clear, and convincing standard.

23 A claimant's daily activities may support an adverse credibility finding if (1)
24 the claimant's activities contradict his other testimony, or (2) "the claimant is able
25 to spend a substantial part of his day engaged in pursuits involving performance of
26 physical functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d
27 625, 639 (9th Cir. 2007) (citing *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)).
28 "The ALJ must make 'specific findings relating to [the daily] activities' and their

1 transferability to conclude that a claimant’s daily activities warrant an adverse
2 credibility determination.” *Id.* (quoting *Burch v. Barnhart*, 400 F.3d 676, 681 (9th
3 Cir. 2005)). A claimant need not be “utterly incapacitated” to be eligible for
4 benefits. *Fair*, 885 F.2d at 603.

5 Here, the ALJ found that Plaintiff was able to attend to his personal needs,
6 do household chores, sit in front of the television or computer, and drive
7 unimpaired. Tr. 31. The ALJ reasoned that sitting in front of the television or
8 computer was transferable to sustaining attention for simple tasks and sitting for
9 periods of time. *Id.* He further found that Plaintiff’s ability to drive unimpaired
10 was transferable to using the upper and lower extremities and turning of the head,
11 neck, and eyes. *Id.*

12 First, the ALJ failed to account for the kind of chair Plaintiff reportedly used
13 to sit for these extended periods. Plaintiff reported to at least one provider that he
14 spends his day sitting in a recliner watching television. Tr. 342. Therefore, this
15 does not transfer to sitting in an office chair eight hours a day. Additionally, the
16 ability to watch television or use a computer throughout the day does not equate to
17 the ability to perform work activity. The Ninth Circuit in *Garrison v. Colvin*
18 specifically addressed the practice of rejecting pain testimony because a claimant
19 took part in everyday activities:

20 We have repeatedly warned that ALJs must be especially cautious in
21 concluding that daily activities are inconsistent with testimony about
22 pain, because impairments that would unquestionably preclude work
23 and all the pressures of a workplace environment will often be
24 consistent with doing more than merely resting in bed all day. *See, e.g.,*
25 *Smolen*, 80 F.3d at 1287 n. 7 (“The Social Security Act does not require
26 that claimants be utterly incapacitated to be eligible for benefits, and
27 many home activities may not be easily transferable to a work
28 environment where it might be impossible to rest periodically or take
medication.” (citation omitted)); *Fair v. Bowen*, 885 F.2d 597, 603 (9th
Cir.1989) (“[M]any home activities are not easily transferable to what

1 may be the more grueling environment of the workplace, where it might
2 be impossible to periodically rest or take medication.”).

3 759 F.3d 995, 1016 (9th Cir. 2014). In *Garrison*, the claimant was caring for her
4 child with help from her mother, and the Ninth Circuit held that the ALJ erred in
5 finding this activity inconsistent with her reported pain. *Id.* at 1015-16. Here,
6 Plaintiff is sitting in a recliner and watching television or accessing his computer.
7 This is literally “resting all day” as referenced in *Garrison*.

8 In terms of Plaintiff’s ability to drive, the Court acknowledges that upon
9 application, Plaintiff reported that he drove a car, Tr. 244, but by March of 2014,
10 he reported a reduced ability to drive associated with his pain, Tr. 279. By January
11 of 2015 he reported to a provider that he no longer drives. Tr. 342. Considering
12 this and the Ninth Circuit’s holding in *Garrison*, these typical daily activities,
13 sitting in a recliner watching television and driving a car, are not sufficient to
14 support the notion that a claimant could sustain work as defined by the
15 Commissioner. *See* S.S.R. 96-8p (The ability to work is defined as performing
16 work activities on a “regular and continuing basis,” which means “8 hours a day,
17 for 5 days a week, or an equivalent work schedule.”). As such, this reason also
18 falls short of meeting the specific, clear, and convincing standard.

19 **C. Inconsistent Statements**

20 The ALJ’s third reason, that Plaintiff made inconsistent statements regarding
21 the side effects of his medications, is not supported by substantial evidence.

22 The Ninth Circuit has held that the ALJ may consider “ordinary techniques
23 of credibility evaluation, such as the claimant’s reputation for lying, prior
24 inconsistent statements . . . and other testimony by the claimant that appears less
25 than candid.” *Smolen*, 80 F.3d at 1284. However, Plaintiff’s statements regarding
26 his medications at the hearing were not inconsistent with his prior statements to
27 providers.

28 //

1 At the hearing, Plaintiff testified that he started “this Lithium”¹ about a
2 month prior to the hearing and Cymbalta three days prior to the hearing. Tr. 58,
3 62. He reported that the Cymbalta was causing dry mouth, nausea, and making
4 him feel jittery. Tr. 57-58. He also stated that his medications made him hyper or
5 drowsy and that these side-effect impacted his ability to work. Tr. 61. He reported
6 that since these medications were new, he needed to call his provider and “tell
7 them the reactions I’m having.” Tr. 62.

8 The ALJ refuted this testimony by citing multiple locations in the record
9 where Plaintiff told providers that he was not experiencing side effects from his
10 medications. Tr. 31. First, the ALJ cited an August 14, 2014 treatment record in
11 which Plaintiff stated that side effects from his medications were minimal. *Id.*
12 *citing* Tr. 409. However, Plaintiff’s medication list at this time did not include
13 either Lithium or Cymbalta. Tr. 409. Next, the ALJ cited a December 2, 2014
14 treatment note in which Plaintiff reported he had no negative side effects from his
15 medications. Tr. 31 *citing* Tr. 405. At this time, Plaintiff was prescribed Lithium,
16 but he was not prescribed Cymbalta. Tr. 405. Likewise, the ALJ cited a third
17 report dated June 15, 2015 in which Plaintiff reported that he experienced no
18 negative side effects from his medications. Tr. 31 *citing* Tr. 398. Again,
19 Plaintiff’s current medications list included Lithium, but not Cymbalta. Tr. 398.
20 Therefore, there is not substantial evidence to support the ALJ’s finding that
21

22 ¹The Court notes that Plaintiff’s reference to “this Lithium” being started a
23 month prior to the hearing may seem inconsistent as Plaintiff being prescribed
24 Lithium in the year prior to the hearing. However, there is evidence in the record
25 that Plaintiff discontinued Lithium in July of 2015 and requested to be assigned a
26 new medication management nurse through his mental health provider a month
27 prior to his hearing. Tr. 361, 424. This is consistent with his testimony at the
28 hearing. Tr. 62.

1 Plaintiff's testimony regarding his side effects were inconsistent with his previous
2 reports to his providers as he was not taking this combination of medication at the
3 time he reported a lack of side effects. As such, this reason does not meet the
4 specific, clear and convincing standard.

5 The case is remanded for the ALJ to readdress Plaintiff's symptom
6 statements on remand in accord with S.S.R. 16-3p.

7 **2. Step Two**

8 Plaintiff challenged the ALJ's step two determination that his obstructive
9 sleep apnea, chronic pain disorder, major depressive disorder, and personality
10 disorder did not constitute severe impairments. ECF No. 14 at 7-12.

11 The step-two analysis is "a de minimis screening device used to dispose of
12 groundless claims." *Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005). An
13 impairment is "not severe" if it does not "significantly limit" the ability to conduct
14 "basic work activities." 20 C.F.R. § 416.922(a). Basic work activities are "abilities
15 and aptitudes necessary to do most jobs." 20 C.F.R. § 416.922(b). "An
16 impairment or combination of impairments can be found not severe only if the
17 evidence establishes a slight abnormality that has no more than a minimal effect on
18 an individual's ability to work." *Smolen*, 80 F.3d at 1290 (internal quotation marks
19 omitted).

20 **A. Obstructive Sleep Apnea**

21 The ALJ acknowledged Plaintiff's diagnosis of severe obstructive sleep
22 apnea in August of 2015, but found no additional treatment and no significant
23 functional limitations related to the condition. Tr. 26 *citing* Tr. 346. However,
24 Plaintiff's hearing was held in September of 2015 and the ALJ closed the record,
25 meaning no additional evidence of treatment and limitations could be associated
26 with the record. Tr. 94. Considering the case is being remanded for the ALJ to
27 readdress Plaintiff's symptom statements, the ALJ is further instructed to gather
28 any outstanding records and readdress Plaintiff's obstructive sleep apnea.

1 **B. Chronic Pain Syndrome**

2 Next, the ALJ noted that the record contained a diagnosis of chronic pain
3 syndrome, but found that chronic pain syndrome was not a medically determinable
4 impairment. Tr. 26. The ALJ reasoned that Plaintiff's pain was the result of his
5 other severe medically determinable impairments and did not constitute an
6 impairment standing alone. *Id.* He found that chronic pain syndrome did not exist
7 as either a psychological or physical disease at the time Plaintiff was diagnosed,
8 and he cited the DSM-IV as support. Tr. 26-27.

9 The Ninth Circuit has discussed pain, chronic pain syndrome, and the
10 complexity associated with quantifying pain. *See Fair*, 885 F.2d at 601 (“[P]ain is
11 a completely subjective phenomenon” and “cannot be objectively verified or
12 measured.”); *Lester*, 81 F.3d at 829 (“Pain merges into and becomes a part of the
13 mental and psychological responses that produce the functional impairments. The
14 components are not neatly separable.”). Recognizing that pain is subjective and
15 that there is no objective way to measure it, the ALJ's flawed analysis of Plaintiff's
16 symptoms statements proves fatal to any of the ALJ's findings associated with
17 Plaintiff's reported pain.

18 Additionally, whether or not an impairment exists according to medical
19 science is an issue best addressed by medical experts, not an ALJ. Therefore, upon
20 remand, the ALJ should address the existence of chronic pain syndrome with both
21 a medical expert and a psychological expert. The ALJ can then rely on their
22 testimony to determine whether chronic pain syndrome is a severe impairment at
23 step two.

24 **C. Mental Health Impairments**

25 The ALJ found that all of Plaintiff's diagnosed mental health impairments
26 were not severe. Tr. 27-29. Considering the case is being remanded for the ALJ to
27 further address Plaintiff's symptom statements, gather additional records, and call
28 a psychological expert, the ALJ will readdress Plaintiff's mental health

1 impairments at step two.

2 The Court is struck by this analysis that eliminates consideration of selected
3 impairments and symptoms beyond step two. The ALJ is to consider Plaintiff's
4 impairments singularly and in combination as part of his step two determination.
5 *See S.S.R. 96-3p.* An ALJ is required to address whether any synergistic
6 relationship between fatigue, depression and pain would further limit Plaintiff's
7 functional abilities. Therefore, upon remand, the ALJ is to take testimony from
8 both a medical and psychological expert regarding the relationship between
9 fatigue, depression, and pain.

10 **3. Step Three**

11 Plaintiff challenges the ALJ's step three determination. ECF No. 14 at 5-6.
12 At step three, the ALJ determined that Plaintiff did not meet Listing 1.04, stating
13 that Plaintiff's "condition does not include the required compromise of a nerve root
14 or spinal cord, and does not feature evidence of nerve root compression, spinal
15 arachnoiditis or lumbar spinal stenosis, as required in listing 1.04." Tr. 29. That is
16 the totality of the ALJ's step three analysis. However, there is evidence of nerve
17 root impingement on imaging from 2013. Tr. 315. Considering the case is being
18 remanded, the ALJ is to readdress Listing 1.04 at step three.

19 **4. Medical Opinions**

20 Plaintiff argues the ALJ failed to properly consider and weigh the medical
21 opinions expressed by Phillip Barnard, Ph.D., Vincent Gollogly, Ph.D., and Dan
22 Donahue, Ph.D. ECF No. 14 at 17-20.

23 Considering the case is being remanded for the above stated reasons and a
24 psychological expert is going to testify at remand proceedings, the ALJ is
25 instructed to reconsider the medical source opinions regarding Plaintiff's mental
26 health impairments, including Dr. Barnard, Dr. Gollogly, and Dr. Donahue.

27 **REMEDY**

28 The decision whether to remand for further proceedings or reverse and

award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). *See also Garrison*, 759 F.3d at 1021 (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

In this case, it is not clear from the record that the ALJ would be required to find Plaintiff disabled if all the evidence were properly evaluated. Further proceedings are necessary for the ALJ to properly address Plaintiff’s symptom statements, make new step two and step three determinations, and further address the psychological medical sources statements in the record. Additionally, the ALJ is instructed to supplement the record with any outstanding evidence and call a medical expert, a psychological expert, and a vocational expert at a remand hearing.

CONCLUSION

Accordingly, **IT IS ORDERED:**

1. Defendant’s Motion for Summary Judgment, **ECF No. 15**, is **DENIED**.
2. Plaintiff’s Motion for Summary Judgment, **ECF No. 14**, is **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for

1 additional proceedings consistent with this Order.

2 3. Application for attorney fees may be filed by separate motion.

3 The District Court Executive is directed to file this Order and provide a copy
4 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
5 and the file shall be **CLOSED**.

6 DATED April 2, 2018.



A handwritten signature in black ink, appearing to be "M" or "Rodgers".

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE